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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

JACK YETIV and ASPENWOOD APT. CORP.,

Petitioners,

v.

HELEN HUEY AND BEATRICE LINK,

Respondents.

On Petition For A Writ Of Certiorari
To The Court Of Appeals
For The First District Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the "policy, custom or practice" requirement for *municipal* liability under 42 U.S.C. § 1983 extend to claims against governmental actors sued in their *individual* capacity for their own intentional wrongdoing?

CERTIFICATE OF PARTIES TO THE PROCEEDING BELOW AND CORPORATE DISCLOSURE

Petitioners

Jack Yetiv

Aspenwood Apartment Corporation

(Aspenwood Apt. Corp. has no parent company and no subsidiaries. No company owns 10% or more of Aspenwood Apt. Corp.'s stock.)

Respondents

Helen Huey

Beatrice Link

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
CERTIFICATE OF PARTIES TO THE PROCEEDING BELOW AND CORPORATE DISCLOSURE	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
A. Facts Material to Consideration of the Question Presented	2
B. Federal Question Sought to Be Reviewed Was First Raised in the Trial Court in Phase I Of This Case	4
REASONS FOR GRANTING THIS PETITION	5
A. The "policy/practice" element applies only to 42 U.S.C. § 1983 claims made against governmental entities – it has no relevance to § 1983 claims made against municipal employees sued in their individual capacity	7

TABLE OF CONTENTS – Continued

Page

B. The Texas courts erred in concluding that Aspenwood will have to prove "policy/practice" in order to prevail on its § 1983 claims against Huey and Link in their individual capacity 9

C. The Texas courts erroneously concluded that even Texas constitutional and state-law tort claims cannot proceed without proof of § 1983 municipal "policy/practice." 13

CONCLUSION 13

APPENDIX

September 27, 2007 Opinion from the First Court of Appeals at Houston, Texas ..... App. 1

May 4, 2005 District Court Order Granting Summary Judgment Motion and Final Judgment ..... App. 21

March 28, 2008 Order from Texas Supreme Court Denying Petition for Review ..... App. 23

May 16, 2008 Order from Texas Supreme Court Denying Motion for Rehearing ..... App. 24

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Gomez v. Toledo, 446 U.S. 635 (1980) 7

Hafer v. Melo, 502 U.S. 358 (1991) 5, 9

Monell v. Department of Social Services, 436 U.S. 658 (1978) 6, 8, 13

Monroe v. Pape, 365 U.S. 473 (1960) 11

U.S. v. Classic, 313 U.S. 299 (1941) 11

West v. Atkins, 487 U.S. 42 (1988) 11

STATE CASES

Aspenwood Apartment Corporation and Jack Yetiv v. Beatrice Link and Helen Huey, No. 01-05-00555-CV, 2007 WL 2832985 (Tex. App. – Houston [1st Dist.] Sept. 27, 2007, pet. denied) 1, 4

City of Houston v. Aspenwood Apt. Corp., No. 01-97-01378-CV, 1999 WL 681939 (Tex. App. – Houston [1st Dist.] Aug. 27, 1999, pet. denied) 3, 5, 11, 12

County of Dallas v. Sempre, ___ S.W.3d ___, 2008 WL 821012 (Tex. March 28, 2008) 5

FEDERAL STATUTES

42 U.S.C. § 1983 ..... *passim*

28 U.S.C. § 1257 1

OPINION BELOW

The opinion of the court of appeals appears as *Aspenwood Apartment Corporation and Jack Yetiv v. Beatrice Link and Helen Huey*, No. 01-05-00555-CV, 2007 WL 2832985 (Tex. App. – Houston [1st Dist.] Sept. 27, 2007, pet. denied), and is reproduced in the Appendix at pages App. 1-20.

STATEMENT OF JURISDICTION

On September 27, 2007, the First Court of Appeals at Houston, Texas issued its opinion affirming dismissal of Petitioners' claims, holding that the failure to establish a municipal "policy, custom or practice" precluded claims against Respondents Huey and Link in their individual capacities. *See* App. 1-20. On March 28, 2008, the Texas Supreme Court denied Petitioners' request for discretionary review. App. 23. Petitioners' motion for rehearing was denied on May 16, 2008. App. 24.

This appeal concerns the interpretation of a federal statute, 42 U.S.C. § 1983. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

STATUTE INVOLVED

Title 42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

A. Facts Material to Consideration of the Question Presented

This case began in 1994 when the City of Houston filed suit against Petitioners Aspenwood Apt. Corp. and Jack Yetiv, attempting to prevent them from renovating the Aspenwood Apartments. Petitioners counterclaimed against the City, and joined Councilmember Helen Huey and head of Neighborhood Protection, Beatrice Link, as individual defendants. In their counterclaim, Petitioners alleged against Huey and Link both federal (42 U.S.C. § 1983) and state constitutional claims, as well as common-law tort claims.

In what will be referred to as "Phase I" of this case, Huey and Link won summary judgment on the basis of qualified immunity (CR:232-286), and therefore, Aspenwood tried the case solely against the City. The jury found that the City had violated Aspenwood's Fourth and Fifth Amendment rights by illegally searching the apartments and by arbitrarily withholding renovation permits. The jury returned a verdict of $340,500 in actual damages plus attorney fees. *Id.*

Both sides appealed and both sides won their appeals. *City of Houston v. Aspenwood Apt. Corp.*, No. 01-97-01378-CV, 1999 WL 681939 at *1 (Tex. App. – Houston [1st Dist.] Aug. 27, 1999, pet. denied). The appellate court reversed and rendered the verdict against the City – holding that there was insufficient evidence of the "policy/practice" prong needed for § 1983 liability. The appeals court also reversed summary judgment that had been granted in favor of Link and Huey (based on lack of qualified immunity), holding that significant evidence existed of constitutional wrong-doing to negate immunity. The court of appeals remanded the case for trial against Huey and Link in their individual capacities.

On remand – in Phase II of this case – the trial judge dismissed the case against Huey on special exceptions and again granted Link summary judgment. App. 21-22. On appeal of the Phase II trial judgment, the court of appeals affirmed the dismissal of Petitioners' federal and state constitutional claims, as well as their tortious interference with contract

claims, against Huey and Link. *See* App. 1-20; *Aspenwood Apartment Corp. v. Link*, Cause No. 01-05-00555-CV, 2007 WL 2832985 (Tex. App. – Houston [1st Dist.] Sept. 27, 2007, pet. denied). The court of appeals held that because Aspenwood had failed to establish a municipal "policy or practice" against the City in Phase I of the case, Aspenwood could not prevail against Huey and Link – even though these defendants were sued in their individual capacities.

Petitioners' Petition for Review was denied by the Texas Supreme Court (App. 23), as was their subsequent "Motion for Rehearing (App. 24).

B. Federal Question Sought to Be Reviewed Was First Raised in the Trial Court in Phase I Of This Case

The federal question was first raised in the trial court in 1995, when Petitioners filed their 42 U.S.C. § 1983 counterclaim against the City of Houston as well as Huey and Link in their individual capacities. The requirement of a municipal "policy or practice" for Section 1983 liability against government officials in an individual capacity is the primary issue addressed in the court of appeals' opinion. *See* App. 1-20; *Aspenwood Apartment Corp. v. Link*, No. 01-05-00555-CV, 2007 WL 2832985 (Tex. App. – Houston [1st Dist.] Sept. 27, 2007, pet. denied) (App. 1-20). It is the appellate court's erroneous dismissal of Petitioners' 42 U.S.C. § 1983 claims against Huey and

Link that prompts the instant petition for writ of certiorari.

REASONS FOR GRANTING THIS PETITION

This Petition is premised on Supreme Court Rule 10(c), with the decision of the state court of appeals conflicting with § 1983 decisions from this Court. The decision being appealed here improperly engrafts a "policy or practice" element onto individual § 1983 liability, directly contradicting established precedent of this Court. *Hafer v. Melo*, 502 U.S. 358, 362 (1991).[1] The Texas appellate decision misstates clear § 1983 law and will likely lead to extensive confusion in subsequent § 1983 decisions in Texas, and perhaps beyond Texas' borders. The Texas Supreme Court, however, denied discretionary review of this case on March 28, 2008 (App. 23), on the same day that the Texas Supreme Court questioned whether its own "conflicts jurisdiction" extended to conflicts with decisions from this Court. *County of Dallas v. Sempre*,

[1] Governmental employees sued in their individual capacities have unique protection in the form of qualified immunity, as was stressed by the Court in *Hafer v. Melo*, 502 U.S. at 362. Here, however, the prior *Aspenwood* decision already held that Huey and Link had failed to demonstrate their entitlement to qualified immunity. *City of Houston v. Aspenwood Apt. Corp.*, No. 01-97-01378-CV, 1999 WL 681939 (Tex. App. Houston [1st Dist.] Aug. 27, 1999, pet. denied).

___ S.W.3d ___, 2008 WL 821012 (Tex. March 28, 2008).

Absent review, governmental actors committing constitutional torts who are sued in their *individual* capacity will now be seeking summary judgment because the plaintiff has no evidence of *municipal* "policy or practice." As a result of this erroneous decision, § 1983 would be gutted and rendered almost meaningless. Egregious unconstitutional conduct by individual "Rambo" governmental actors would then be condoned because according to the erroneous decision being appealed here, § 1983 affords no redress of any kind unless an unconstitutional municipal "policy or practice" can be proved by the plaintiff.

The decision being appealed here is not only contrary to established precedent of this Court pertaining to § 1983 claims but it also extends the "policy/practice" requirement to state-constitutional and even tort contexts. The decision being appealed here held that Aspenwood would have to prove the same "policy or practice" element in order to prevail against Huey and Link even on Aspenwood's Texas constitutional and state law tort claims.

This is error. No court has ever held, or even hinted, that a plaintiff must prove "policy or practice" in any state-law context, nor is it recognized as a requirement for individual liability under federal law. Indeed, the "policy or practice" requirement is uniquely a creature of federal (§ 1983) law, established by this Court in *Monell v. Department of Social*

Servs., 436 U.S. 658 (1978). Even under federal law, this element applies *only* to governmental entities, and not to governmental actors sued in their individual capacity.

Thus, the decision being appealed here is likely to be used to impair meritorious claims of all sorts – state and federal – against rogue municipal or other state actor employees or officials who intentionally commit constitutional wrongs, reflecting a potential for mischief extending well beyond the type of controversy presented here.

This decision requires correction to prevent widespread confusion.

A. The "policy/practice" element applies only to 42 U.S.C. § 1983 claims made against governmental entities – it has no relevance to § 1983 claims made against municipal employees sued in their individual capacity.

A civil rights claim under 42 U.S.C. § 1983 has only two elements, as noted by this Court in *Gomez v. Toledo*, 446 U.S. 635, 640 (1980):

> ***By the plain terms of § 1983, two – and only two – allegations are required in order to state a cause of action under that statute.*** First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.

> Petitioner has made both of the required allegations. He alleged that his discharge by respondent violated his right to procedural due process, and that respondent acted under color of Puerto Rican law.

Although this Court has held that municipalities are "persons," and therefore can be sued under 42 U.S.C. § 1983. *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978), this Court also concluded in *Monell* that municipalities could not be sued under a *respondeat superior* theory. Instead, this Court held that § 1983 liability could attach to municipalities only if the plaintiff could also prove that the municipality had a "policy or practice" that pertained to the sort of constitutional deprivation that the plaintiff alleged.

Under the plain language of § 1983 as well as decisions of this Court, the "policy/practice" element simply does not apply to § 1983 claims made against governmental employees sued in their individual capacity. Indeed, this Court has made it clear that there is no need to prove "policy or practice" in order to prevail on a § 1983 claim against a governmental actor in her individual capacity:

> Personal-capacity suits, on the other hand, seek to impose individual liability upon a government officer for actions taken under color of state law. Thus, "[o]n the merits, to establish *personal* liability in a § 1983 action, it is enough to show that the official, acting

> under color of state law, caused the deprivation of a federal right." ***While the plaintiff in a personal-capacity suit need not establish a connection to governmental "policy or custom," officials sued in their personal capacities, unlike those sued in their official capacities, may assert personal immunity defenses such as objectively reasonable reliance on existing law.***

Hafer v. Melo, 502 U.S. 358, 362 (1991) (emphasis added).

While this Court's jurisprudence is clear that the elements for individual liability under § 1983 do not include any reference to municipal "policy, custom or practice," perhaps it is the absence of any decision from this Court directly negating any such requirement in an individual liability case that led to the state court of appeals' erroneous conclusion.

B. The Texas courts erred in concluding that Aspenwood will have to prove "policy/practice" in order to prevail on its § 1983 claims against Huey and Link in their individual capacity.

Despite clear precedent issued by this Court, the Texas courts held that Aspenwood *would* have to show a municipal "policy or practice" in order to prevail at re-trial against Huey and Link in their individual capacities, which the Texas appellate court stated as follows (App. 3):

> However, this Court reversed those findings and held that (1) there was no evidence that "Houston City Council executed a policy statement, ordinance, regulation or decision to demolish or illegally search low-income housing or withhold permits" and (2) there was no evidence "of a persistent, widespread, permanent or well-settled custom or usage to demolish or illegally search low-income housing or withhold building permits. This Court's determination of the issues was essential to the judgment in Yetiv's action against the City. ***Relitigation of these same issues would be necessary in Yetiv's current action against Huey in order to determine whether her actions could be fairly attributed to the City so that it may be said that she was acting "under color of state law." As a result, Yetiv is collaterally estopped from relitigating these issues in the proceedings against Huey.***

The Texas appeals court has confused several distinct § 1983 doctrines. First, whether Huey's and Link's acts are "fairly attributable" to the City has nothing to do with Aspenwood's § 1983 claims against Huey and Link in their individual capacity. In fact, the City is no longer even a defendant in this case, and therefore the "City's" actions will be entirely irrelevant in the retrial of this case against Huey and link.

Second, whether a municipal employee's actions are "fairly attributed" to the City for which she works

has absolutely nothing to do with the "under color of state law" requirement in the § 1983 statute. The "under color of state law" requirement is met simply by showing that the actions were taken by a municipal employee. *See Monroe v. Pape*, 365 U.S. 473, 484 (1960) (alleging that defendants were City of Chicago police officers was sufficient to show that they took their actions under color of state law);[2] *see also West v. Atkins*, 487 U.S. 42, 50 (1988) ("State employment is generally sufficient to render the defendant a state actor . . . Thus, generally, a public employee acts under color of state law while exercising his responsibilities pursuant to state law.").

Nevertheless, and despite the foregoing indisputable state of the law, the Texas appellate panel repeatedly stated in its opinion that Aspenwood would have to prove "policy or practice" of the *City of Houston* in order to establish *individual* liability for Huey and Link.

Interestingly, in the first appeal in this case, the panel reversed and rendered a jury verdict that Aspenwood had obtained against the City of Houston

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[2] The *Monroe* court cited with approval its previous decision defining "under color of state law" as follows from *U.S. v. Classic*, 313 U.S. 299, 326 (1941): "The alleged acts of appellees were committed *in the course of their performance of duties* under the Louisiana statute requiring them to count the ballots, to record the result of the count and to certify the result of the election. *Misuse of power*, possessed by virtue of state law and made possible only because the wrongdoer *is clothed with the authority of state law*, is action taken "under color of state law."

on the ground that there was insufficient evidence of a government "policy or practice" to support § 1983 liability as to the City. *City of Houston v. Aspenwood Apt. Corp.*, No. 01-97-01378-CV, 1999 WL 681939 (Tex. App. – Houston [1st Dist.] Aug. 27, 1999, pet. denied). In that same opinion, however, the first appellate panel held that there ***was*** sufficient evidence to state a claim of § 1983 liability against Huey and Link in their ***individual*** capacities, and that they lacked good faith to support qualified immunity. *Id.*

In the second appeal – the opinion before this Court on petition for writ of certiorari, the court of appeals disregarded this critical distinction between individual and municipal liability. Instead, the second panel held that Aspenwood's failure to prove a municipal "policy or practice" precluded the individual liability of Huey and Link for their own wrongful conduct. App. at 3-4.

This holding is, of course, wrong – the second panel improperly engrafted a municipal "policy or practice" element onto § 1983 claims made against governmental employees sued in their individual capacities.

C. The Texas courts erroneously concluded that even Texas constitutional and state-law tort claims cannot proceed without proof of § 1983 municipal "policy/practice."

After erroneously holding that "policy/practice" is an element of § 1983 claims made against governmental employees sued in their individual capacities, the Texas courts extended this erroneous thinking by concluding that proving "policy/practice" was essential to all of Aspenwood's claims in this case – even its Texas constitutional and state tort (*e.g.*, tortious interference with contract) claims against Huey and Link in their individual capacities.

The *Monell* "policy/practice" element is a uniquely federal concept and has no application whatsoever to state constitutional or state common-law tort claims. The extension of the municipal "policy or practice" requirement for § 1983 liability to individual claims, and even state-law claims, greatly threatens to hamper vindication of constitutional wrong-doing through state courts.

CONCLUSION

The appeals court has provided a recipe to cities on how to avoid § 1983 liability, or even state law liability, for constitutional wrong-doing. Municipal employees and officials are encouraged to act on their own, taking matters into their own hands and engaging in unconstitutional conduct. Because there is no

municipal "policy or practice," the city will itself be insulated from liability under § 1983. Under the court of appeals' opinion before the Court here, the failure to establish a "policy or practice" against the City will likewise insulate the individual constitutional tort-feasor from individual liability – not just under § 1983, but even related state law claims. This needless, and inappropriate, expansion of the municipal "policy or practice" requirement requires curtailment.

For the foregoing reasons, Petitioners Aspenwood Apartment Corporation and Jack Yetiv respectfully request that this Court grant this Petition for Writ of Certiorari.

August 14, 2008.

Respectfully submitted,

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[LOGO]

In The
Court of Appeals
For The
First District of Texas

NO. 01-05-00555-CV

ASPENWOOD APARTMENT CORP.
AND JACK YETIV, Appellants

V.

BEATRICE LINK AND HELEN HUEY, Appellees

On Appeal from the 215th District Court
Harris County, Texas
Trial Court Cause No. 1994-59707

MEMORANDUM OPINION ON REHEARING

(Filed Jun. 26, 2008)

We withdraw our opinion of April 19, 2007, and issue this one in its stead. We grant appellee's, Beatrice Link's, motion for rehearing, we deny appellee's, Helen Huey's, motion for rehearing, and we also deny appellants' motion for rehearing.

Appellants, Aspenwood Apartment Corporation and Jack Yetiv (collectively "Yetiv") filed claims

against appellees, Beatrice Link and Helen Huey, alleging various constitutional and common law violations. Yetiv's claims against both Link and Huey were disposed of before trial when the trial court dismissed Huey pursuant to her special exceptions and granted Link summary judgment. In two issues, Yetiv argues that the trial court erred in (1) sustaining Huey's special exceptions and dismissing his case against her and (2) granting Link's motion for summary judgment. We affirm in part and reverse and remand in part.

Background

According to the pleadings, Yetiv is the primary secured-lienholder of apartment properties owned by Aspenwood Apartment Corporation ("AAC"). The City of Houston ("the City") filed a lawsuit seeking to enjoin Yetiv from making repairs to certain of those properties without the necessary building permits. Yetiv counterclaimed against the City, joining Huey, a former City Council member, and Link, Assistant Director of Neighborhood Protection, as counter-defendants.[1] In his counterclaim, Yetiv alleged malicious prosecution and abuse of process; tortious interference with contracts; and section 1983 claims for unconstitutional takings of property, retaliation for asserting First Amendment rights, illegal

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[1] Huey and Link were sued in their individual and official capacities.

searches, and due process violations. In addition, he requested a declaratory judgment for "takings" and due course of law violations under the Texas Constitution caused by improperly withholding permits. Yetiv sought actual damages, punitive damages, attorneys' fees, and injunctive relief.

The trial court granted summary judgment for Huey on all claims asserted against her individually and for Link on all state-law claims asserted against her individually. Yetiv non-suited his federal-law claims against Link and proceeded to trial against the City only. The jury was charged only on Yetiv's claim against the City for First Amendment retaliation, illegal searches, and permit withholding. The jury found that the City:

1. did not retaliate against Yetiv for asserting his First Amendment rights;
2. did search the apartments without a search warrant or beyond the scope of any warrant; and
3. did arbitrarily or capriciously deny or withhold permits for work on the apartments.

The City appealed the jury's verdict, and Yetiv appealed the grant of summary judgment in favor of Huey and Link. This Court (1) reversed the verdict against the City and rendered judgment that Yetiv take nothing on his claims and (2) reversed the summary judgments in favor of Huey and Link and remanded the issues for trial. *City of Houston v.*

Aspenwood Apartment Corp., No. 01-97-01378-CV, 1999 WL 681939, at * 1 (Tex. App. – Houston [1st Dist.] Aug. 27, 1999, pet. denied).

On remand, Huey specially excepted to Yetiv's pleadings. In her special exceptions, she argued that, because Yetiv was collaterally estopped from asserting his claims by both the jury's verdict and this Court's opinion, he failed to state a viable cause of action. The trial court sustained Huey's special exceptions and ordered Yetiv to replead within 30 days. Yetiv did not replead, and Huey filed a motion to dismiss based on his failure to do so. Pursuant to that motion, the trial court dismissed Yetiv's case against Huey.

Link moved for summary judgment on the grounds that she had conclusively established each of the elements of her affirmative defenses under the Texas Tort Claims Act, the statute of limitations, and the doctrines of collateral estoppel and res judicata. Without specifying its reasons, the trial court granted Link's summary judgment motion and rendered a final judgment that Yetiv take nothing on his claims against her.[2]

Yetiv now appeals the trial court's decisions to (1) sustain Huey's special exceptions and dismiss the

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[2] This same final judgment incorporated the trial court's order dismissing Yetiv's claims against Huey.

case against her and (2) grant Link's motion for summary judgment.

Huey's Special Exceptions-Collateral Estoppel

In his first issue, Yetiv argues that the trial court erred in granting Huey's special exceptions and motion to dismiss. Specifically, Yetiv argues that, because an opinion of this Court previously held that a fact issue existed as to Huey's individual liability, it was error for the trial court to grant her special exceptions on the grounds that Yetiv was collaterally estopped from asserting his claims by the holdings in that same appellate opinion. We disagree in part.

A. Standard of Review

A special exception is a proper method to determine whether a plaintiff has pleaded a cause of action. *See* TEX. R. CIV. P. 91; *Alpert v. Crain, Caton, & James, P.C.*, 178 S.W.3d 398, 405 (Tex. App. – Houston [1st Dist.] 2005, pet. denied). When special exceptions are sustained, the pleader may either amend the petition or refuse to amend and challenge the ruling on appeal. *Alpert,* 178 S.W.3d at 405.

We review a trial court's dismissal of a case upon special exceptions for failure to state a cause of action as an issue of law, using a de novo standard of review. *Id.* We accept all of the plaintiff's material factual allegations and all reasonable inferences from those

allegations as true. *Sorokolit v. Rhodes,* 889 S.W.2d 239, 240 (Tex. 1994).

B. Analysis

Huey specially excepted to Yetiv's causes of action on the grounds that he was collaterally estopped from asserting his claims against her because the issues set forth in the pleadings were fully and fairly litigated in his previous action against the City. The doctrine of collateral estoppel, or issue preclusion, prevents the relitigation of particular issues when (1) the facts sought to be litigated in the second action were fully and fairly litigated in the first action, (2) those facts were essential to the judgment in the first action, and (3) the parties were cast as adversaries in the first action. *Turnage v. JPI Multifamily, Inc.,* 64 S.W.3d 614, 617 (Tex. App. – Houston [1st Dist.] 2001, no pet.) (citing *Sysco Food Servs., Inc. v. Trapnell,* 890 S.W.2d 796, 801 (Tex. 1994)). Because Yetiv and Huey have been cast as adversaries throughout the progression of this case, the third element of the collateral estoppel doctrine is satisfied, and we examine the pleadings to determine whether the facts sought to be litigated thereunder (1) were fully and fairly litigated in Yetiv's action against the City and (2) were essential to the judgment in that action.

1. Section 1983 Claims

Under section 1983, Yetiv asserted claims against Huey for unconstitutional "taking" of his property,

retaliation for asserting First Amendment rights, illegal searches, and due process violations for arbitrarily withholding building permits. To state a claim for relief in an action brought under section 1983, Yetiv must establish that he was deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed "under color of state law."[3] 42 U.S.C. § 1983 (2000); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50, 119 S. Ct. 977, 985 (1999). Like the state-action requirement of the Fourteenth Amendment, the "under color of state law" element of section 1983 excludes from its reach "merely private conduct, no matter how discriminatory or wrongful." *Sullivan*, 526 U.S. at 50, 119 S. Ct. at 985. Thus, conduct allegedly causing the deprivation of a constitutional right must be fairly attributable to the State. *See Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 936-37, 102 S. Ct. 2744, 2753-54 (1982). In determining the question of fair attribution, (1) the deprivation must be caused by the exercise of some right or

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[3] Section 1983 provides in pertinent part that:

> Every person who, *under color of any statute, ordinance, regulation, custom, or usage, of any State* or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, . . .

42 U.S.C. § 1983 (2000) (emphasis added).

privilege created by the State or by a rule of conduct imposed by it or by a person for whom it is responsible, and (2) the party charged with the deprivation must be a person who may fairly be said to be a state actor. *Id.*

The following wrongful conduct was alleged by Yetiv against Huey in her individual capacity: campaigning on promises to gentrify the residential district in which the apartments at issue were located, encouraging neighbors living near the apartment to secretly videotape the properties, and misrepresenting information to City Council concerning the status of the apartments. Assuming this conduct could be shown to result in the deprivation of constitutional rights, Yetiv was required to show that Huey's actions were taken "under color of state law" in order to prevail. *Sullivan,* 526 U.S. at 50, 119 S. Ct. at 985. Yetiv's pleadings further alleged that the City, through the actions of Link, Huey, and the City Council, adopted or expressly ratified several unconstitutional policies – namely, policies to (1) demolish low-income housing, (2) wrongfully withhold building and repair permits, and (3) allow inspectors to illegally search Houston residents' housing. In the alternative, he alleged that City employees operated under a persistent, widespread, permanent, and well-settled custom of improperly withholding permits and illegally searching low-income housing.

The facts surrounding these alleged policies and customs were fully litigated in Yetiv's action against the City. There, the jury found the City liable on the

grounds that it had illegally searched Yetiv's properties and had arbitrarily and capriciously withheld building permits. However, this Court reversed those findings and held that (1) there was no evidence that "Houston City Council executed a policy statement, ordinance, regulation, or decision to demolish or illegally search low-income housing or withhold permits" and (2) there was no evidence "of a persistent, widespread, permanent, and well-settled custom or usage to demolish or illegally search low-income housing or withhold building permits. . . ." *Aspenwood Apartment Corp.*, 1999 WL 681939, at * 7, 12. This Court's determination of the issues was essential to the judgment in Yetiv's action against the City. Relitigation of these same issues would be necessary in Yetiv's current action against Huey in order to determine whether her actions could be fairly attributed to the City so that it may be said that she was acting "under color of state law." As a result, Yetiv is collaterally estopped from relitigating these issues in the proceedings against Huey. *See Turnage*, 64 S.W.3d at 617.

Because issues necessary to the resolution of Yetiv's claims against Huey were fully and fairly litigated in Yetiv's previous action against the City, we conclude that Yetiv was collaterally estopped from asserting his section 1983 claims, as pleaded, against Huey. The trial court, therefore, did not err in granting Huey's special exceptions. We further conclude that, because Yetiv failed to replead his claims and allege conduct separate and apart from the issues

already litigated against the City, the trial court did not err in dismissing the section 1983 claims against Huey.

Accordingly, we overrule Yetiv's first issue with respect to his section 1983 claims against Huey.

2. State Law Claims

Yetiv's pleadings allege an unlawful taking of property and the deprivation of due process property rights under the Texas Constitution. TEX. CONST. art. I, §§ 17, 19. Huey specially excepted to these claims on the grounds that this Court

> decided that [Yetiv] did not suffer a constitutional deprivation as a result of conduct attributable to the legislative body of the City of Houston or through its ratification of conduct by employees; therefore, without specific pleadings describing a taking by withholding City of Houston building permits involving [the property in question], [Huey] cannot adequately prepare a defense or assess her liability and a special exception should be granted.

Like the "under color of state law" requirement in section 1983 claims, to prevail on a theory of unconstitutional taking under the Texas Constitution, Yetiv must show that Huey was acting "with authority or color of authority." *See Steele v. City of Houston*, 603 S.W.2d 786, 791-92 (Tex. 1980). As discussed previously, this Court determined that there was no

evidence that (1) the "Houston City Council executed a policy statement, ordinance, regulation, or decision to demolish or illegally search low-income housing or withhold permits" or (2) "of a persistent, widespread, permanent, and well-settled custom or usage to demolish or illegally search low-income housing or withhold building permits. . . ." *Aspenwood Apartment Corp.*, 1999 WL 681939, at * 7, 12. These determinations were essential to the judgment in Yetiv's action against the City, and relitigation of these same issues would be necessary in Yetiv's current action against Huey to determine whether Huey had authority or the color of authority to act. As a result, Yetiv is collaterally estopped from relitigating these issues, and the trial court did not err in sustaining Huey's special exceptions. *See Turnage*, 64 S.W.3d at 617. Because Yetiv failed to replead his claims and allege conduct separate and apart from the issues already litigated against the City, the trial court did not err in dismissing the his state constitutional claims against Huey.

Accordingly, we overrule Yetiv's first issue with respect to his state constitutional claims.

3. Intentional Tort Claims

Yetiv's pleadings assert claims against Huey for tortious interference with a contract, malicious prosecution, and abuse of process. Huey's special exceptions to these claims stated that,

> [s]ince [this Court] concluded that City of Houston decisions leading to search warrants and citations involving [the property in question], as well as building permits, were not based on inappropriate decisions of Beatrice Link, the Houston City Council [Defendant Huey] and/or through a pattern, practice, policy or custom in the City . . . , unless the current litigation of Defendant Huey's activities involving Yetiv/AAC involve new issues, collateral estoppel appears to bar this suit; therefore without specific pleadings describing building permit decisions involving [the property in question], Defendant Huey cannot adequately prepare a defense or assess or [sic] her liability. . . .

We consider each of Yetiv's individual tort claims separately to determine whether the doctrine of collateral estoppel, as set forth previously, applies.

a. Tortious Interference with Prospective Contracts

The elements of a cause of action for tortious interference with a prospective contract are: (1) there was a reasonable probability the plaintiff would have entered into a contractual relationship, (2) the defendant's malicious and intentional act prevented the relationship from occurring, doing harm to the plaintiff, (3) the defendant lacked privilege or justification, and (4) as a result, the plaintiff suffered actual damage or loss. *Winston v. Am. Med. Int'l, Inc.*, 930 S.W.2d 945, 953 (Tex. App. – Houston [1st Dist.] 1996,

writ denied). Yetiv's tortious interference claim specifically asserts that Huey's

> campaign of harassment . . . interfered with the creation of new lease contracts because refusal to issue permits prevented the timely remodeling of the apartments at the Property. In addition, no leasing occurred (or could have occurred) at all on October 27, 1994, due to the 'appropriation' of the Property by [Huey and Link] during their raid. In addition, by their threats to [Yetiv's] workers on October 27, 1994, [Huey and Link] interfered with contractual relationships between [Yetiv] and [his] employees.

Yetiv's pleadings thus supply three bases for Huey's liability for tortious interference: (1) the refusal to issue permits, (2) an illegal search on October 27, 1994, and (3) threats made to Yetiv's employees during the illegal search.[4] While the jury in Yetiv's

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[4] According to the statement of facts in Yetiv's counterclaim,

> [o]n October 27, . . . an illegal raid was mounted by the City of Houston, beginning with an overflight by a police helicopter, and then the subsequent appearance of approximately 4-5 police cruisers, as many as 10 police officers, and perhaps 30 City Inspectors and private contractors over the course of the day. . . . This "raid" was purportedly conducted pursuant to a search warrant. . . . The sworn affidavit which led to the creation of the search warrant . . . executed by two City of Houston agents contains several false statements. . . . In any case, even if the affidavit had been truthful, the City's agents far exceeded the scope of

(Continued on following page)

actions against the City found that the City had both (1) arbitrarily and/or capriciously denied or withheld permits from Yetiv and (2) undertook one or more searches of [Yetiv's] property without a search warrant and/or that searches were beyond the scope of the warrant, those findings were reversed on appeal. In resolving the claims against the City, the issue of whether refusal to issue a permit and an illegal search caused Yetiv injury was fully and fairly litigated. The determination of these issues was essential to the judgment against Yetiv in that action, and, thus, he is collaterally estopped from relitigating the issue in the instant action against Huey. *See Turnage,* 64 S.W.3d at 617. The trial court did not err in sustaining Huey's special exceptions on the grounds of collateral estoppel.

Accordingly, we overrule Yetiv's first issue with respect to his tortious interference claim.

b. Malicious Prosecution and Abuse of Process

To prevail on a claim of malicious prosecution, a plaintiff must establish the following: (1) commencement of a criminal prosecution against the plaintiff, (2) initiated or procured by the defendant, (3) termination

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the search warrant, even if the search warrant was valid.

The statement of facts does not indicate what threat to Yetiv's employees, if any, was made by Huey.

of the prosecution in the plaintiff's favor, (4) the plaintiff's innocence, (5) the defendant's lack of probable cause to initiate the proceedings, (6) malice in filing the charge, and (7) damages. *Burrows v. Neiman-Marcus Group, Inc.*, 976 S.W.2d 784, 787 (Tex. App. – Houston [1st Dist.] 1998, no pet.). An abuse of process occurs where: (1) the defendant made an illegal, improper, perverted use of the process; (2) the defendant had an ulterior motive or purpose in exercising such illegal, perverted, or improper use of process; and (3) that damage resulted to the plaintiff from the irregularity. *Detenbeck v. Koester,* 886 S.W.2d 477, 480 (Tex. App. – Houston [1st Dist.] 1994, no writ).

In this context, Yetiv alleged that he was required to hire an attorney when building officials wrote him 21 criminal citations in order to advance the wrongful purposes alleged in his pleadings.[5] Yetiv further alleges that each of these citations was dismissed when building officials failed to appear on the designated court dates. The issues surrounding these citations were not fully and fairly litigated in Yetiv's previous action against the City. In reversing the finding of liability against the City and rendering judgment that Yetiv take nothing on his claims, this Court restricted its holding to a discussion of the City's liability under section 1983 where there was no

[5] Yetiv's pleadings assert that Huey was engaged in a "campaign of harassment" for the purpose of fulfilling her promises to area-residents to demolish low-income housing.

evidence establishing a City policy or custom to (1) demolish or illegally search low-income housing and (2) withhold permits.[6] *See Aspenwood Apartment Corp.*, 1999 WL 681939, at * 7, 12. That is, there was no discussion of the citations in this Court's resolution of the litigation against the City. Because the issues surrounding the issuance of 21 criminal citations against Yetiv were not fully or fairly litigated in Yetiv's previous action against the City, the trial court erred in sustaining Huey's special exceptions on the grounds that Yetiv was collaterally estopped from asserting his malicious prosecution and abuse of process claims.

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[6] Huey's special exceptions represent that this Court's prior holding was that,

> City of Houston decisions leading to *search warrants and citations* involving [the property in question], as well as building permits, were not based on inappropriate decisions of Beatrice Link, the Houston City Council [Defendant Huey] and/or through a pattern, practice, policy or custom in the City.... (Emphasis added.)

However, the Court was considering the more narrow question, as it was presented to the jury, whether

> the [City] undertook one or more searches of [Yetiv's] property without a search warrant which was based on a truthful affidavit and/or that such searches were beyond the scope of the warrant through decisions of Beatrice Link, the Houston City Council and/or through a pattern, practice, policy or custom in the City.

See Aspenwood Apartment Corp., 1999 WL 681939, at * 4. That is, the citations were not included in either the jury's considerations or this Court's earlier analysis or opinion.

Accordingly, we sustain Yetiv's first issue only as to his malicious prosecution and abuse of process claims.[7]

Link's Motion for Summary Judgment

In his second issue, Yetiv argues that it was error for the trial court to grant summary judgment in favor Link because she failed to conclusively establish her affirmative defenses. We disagree.

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[7] On rehearing, Huey argues that Yetiv's malicious prosecution and abuse of process claims were not properly asserted against her because (1) in our 1999 opinion, this Court held that those claims had been abandoned, and (2) Yetiv conceded that he did not assert those claims against Huey in his briefing in the instant matter. We disagree. In a footnote in our 1999 opinion, we stated as follows:

> Huey's summary judgment motion also attacked Yetiv and AAC's malicious prosecution and abuse of process claims and their prayer for mental anguish damages. However, by the time summary judgment was granted, Yetiv and AAC no longer sought these damages, AAC's counterclaim had dropped these same claims, and Yetiv admits that he had abandoned those same claims.

Aspenwood Apartment Corp., 1999 WL 681939, n. 27. Now however, Yetiv's claims for malicious prosecution and abuse of process are present in the live pleadings against Huey presented for our review. At the time Huey was dismissed without prejudice pursuant to her motion, Yetiv's First Amended Counterclaim and Request for Injunctive Relief was the live pleading. This pleading clearly contains claims for malicious prosecution and abuse of process, and as such, those claims were properly asserted against Huey. In addition, we do not interpret Yetiv's brief to constitute a concession of his claims against Huey.

A. Standard of Review

The standard of review in a summary judgment proceeding is well settled. When a defendant moves for summary judgment on an affirmative defense, she is entitled to a summary judgment if she conclusively establishes each of the essential elements of her affirmative defense as a matter of law. *Montgomery v. Kennedy,* 669 S.W.2d 309, 310-11 (Tex. 1984); *Marshall v. Sackett,* 907 S.W.2d 925, 930 (Tex. App. – Houston [1st Dist.] 1995, no writ). Evidence is conclusive only if reasonable persons could not differ in their conclusions. *City of Keller v. Wilson,* 168 S.W.3d 802, 816 (Tex. 2005). If the defendant produces sufficient evidence to establish the right to a summary judgment, the plaintiff must present contradictory evidence that gives rise to a fact issue in order to avoid summary judgment. *Marshall,* 907 S.W.2d at 930.

On appeal, evidence favorable to the nonmovant will be taken as true. *Id.* In addition, every reasonable inference from the evidence must be indulged, and any doubts resolved, in the nonmovant's favor. *Id.* When, as here, a summary judgment does not specify the grounds on which it was granted, we will affirm the judgment if any one of the theories advanced in the motion is meritorious. *Joe v. Two Thirty Nine Joint Venture,* 145 S.W.3d 150, 157 (Tex. 2004).

B. Analysis

Yetiv asserted the same section 1983, state constitutional, and intentional tort claims against Link that he asserted against Huey. In her motion for summary judgment, Link argued, as affirmative defenses, (1) that all of Yetiv's claims were barred by section 101.106 of the Texas Tort Claims Act, as well as by the doctrines of collateral estoppel and res judicata and (2) that Yetiv's section 1983 claims were barred by the statute of limitations. For the reasons set forth in our analysis of the doctrine of collateral estoppel as it applied to Yetiv's claims against Huey, we hold that Yetiv is collaterally estopped from asserting his section 1983 claims, state constitutional claims, and tortious interference with a contract claims against Link.

The only claims remaining against Link are Yetiv's intentional tort claims for malicious prosecution and abuse of process. On rehearing, Link argues that Yetiv may not assert these claims against her because they were not a part of the live pleadings at the time the trial court granted summary judgment in her favor. We agree. Link's motion for summary judgment was filed in March of 2005. At that time, Yetiv's second amended petition, filed on January 28, 2005, was the live pleading. No subsequent pleadings were filed by Yetiv prior to the trial court's rendition of its final judgment granting Link's motion for summary judgment. Yetiv's second amended petition does not contain any claims for malicious prosecution or abuse of process. Because Yetiv failed to include his

claims for malicious prosecution and abuse of process in his second amended petition, he abandoned those claims with respect to Link. *See* TEX. R. CIV. P. 65.

We overrule Yetiv's second issue.

Conclusion

We affirm in part and reverse and remand only with respect to Yetiv's claims against Huey for malicious prosecution and abuse of process.

George C. Hanks, Jr.
Justice

Panel consists of Justices Taft, Alcala, and Hanks.

NO. 94-59707

ASPENWOOD APT. CORP. AND JACK YETIV	§	IN THE DISTRICT COURT OF
VS	§	HARRIS COUNTY, TEXAS
BEATICE LINK AND HELEN HUEY	§	215th JUDICIAL DISTRICT

ORDER GRANTING SUMMARY JUDGMENT MOTION AND FINAL JUDGMENT

(Filed May 4, 2005)

The Court considered defendant Beatrice Link's Third Amended Motion for Summary Judgment on Link's Affirmative Defenses and the plaintiffs' response thereto.[1]

After considering the Motion for Summary Judgment, the Response, and the arguments of counsel, the Court finds that the Defendant Link's motion is meritorious and should be granted. Accordingly, it is hereby ordered that Defendant Link's Motion for Summary Judgment is granted.

The Court orders that plaintiffs Aspenwood Apt. Corp and Jack Yetiv take nothing by their suit against all defendants herein. In making this order, the Court incorporates its order dated December 27,

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[1] Link's motion was filed with this Court on or around March 18, 2005. Plaintiffs' response(s) were filed on April 28, 2005.

2004 wherein the Court dismissed plaintiffs' claims against defendant Helen Huey.

This is a final judgment disposing of all parties and all issues before this Court.

It is so ordered.

/s/ Levi J. [Illegible]
JUDGE PRESIDING
215TH DISTRICT COURT

SIGNED: May 4, 2005.

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RE: Case No. 07-1035
COA #: 01-05-00555-CV TC#: 1994-59707

STYLE: BEATRICE LINK AND HELEN HUEY, IN THEIR INDIVIDUAL CAPACITIES
v. ASPENWOOD APARTMENT CORPORATION AND JACK YETIV

Today the Supreme Court of Texas denied the petitions for review in the above-referenced case.

MAIL TO: MR. ALAN B. DAUGHTRY
JACKSON WALKER L L P
1400 MCKINNEY SUITE 1900
HOUSTON TX 77010

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RE: Case No. 07-1035
COA #: 01-05-00555-CV TC#: 1994-59707

STYLE: BEATRICE LINK AND HELEN HUEY, IN THEIR INDIVIDUAL CAPACITIES
v. ASPENWOOD APARTMENT CORPORATION AND JACK YETIV

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review. (Justice Hecht not sitting)

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